(3)

No. 06-1168

IN THE

# Supreme Court of the United States

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BUFFALO TEACHERS FEDERATION, BUFFALO EDUCATIONAL SUPPORT TEAM, NEA/NY, TRANSPORTATION AIDES OF BUFFALO, NEA/NY, SUBSTITUTES UNITED BUFFALO NEA/NY, BUFFALO COUNCIL OF SUPERVISORS AND ADMINISTRATORS, AFSCME LOCAL 264, PROFESSIONAL CLERICAL AND TECHNICAL EMPLOYEES' ASSOCIATION,

*Petitioners*,

v.

RICHARD TOBE, THOMAS E. BAKER, ALAIR TOWNSEND, H. CARL MCCALL, JOHN J. FASO, JOEL A. GIAMBRA, MAYOR ANTHONY MASIELLO, RICHARD A. STENHOUSE, ROGER G. WILMERS, IN THEIR OFFICIAL CAPACITIES AS DIRECTORS/ MEMBERS OF THE BUFFALO FISCAL STABILITY AUTHORITY,

*Respondents*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITIONERS' REPLY BRIEF

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## PETITIONERS' REPLY BRIEF

## ARGUMENT

### I.

In the Petition we showed that the Second Circuit's decision in this case is in conflict with the Ninth Circuit's *Continental Illinois National Bank* decision[1] on an important Contract Clause issue—the applicable standard of judicial review for determining the constitutionality of state legislative action impairing *state political subdivision* contractual financial obligations. The Opposition Brief's principal response is that the Second Circuit "expressly stated" that it was applying, and did in fact apply, a standard of judicial review no less exacting than the "careful scrutiny" standard "outlined by this Court in [*United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977)]" and subsequently "applied" by the Ninth Circuit in *Continental Illinois National Bank*. *See* Respondents' Brief in Opposition ("Opp. Br.") at 1; *see also id.* at 14-15. That effort to avoid this Court's review suffers from two fatal flaws.

To begin with, Respondents distort what the Second Circuit "expressly stated" with regard to the applicable standard of judicial review. What the Second Circuit expressly stated at the outset of its opinion was that it would proceed by applying what it called a "*less deference scrutiny*" standard of judicial review. *See* Pet. App. 13a (emphasis in original). And, the "*less deference scrutiny*" standard of judicial review explicated by the Second Circuit is *not*—as Respondents would have it—the functional equivalent of the *United States Trust* "careful scrutiny" standard applied by the Ninth Circuit in *Continental Illinois National Bank*. To the contrary, it is a

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[1] *Continental Illinois National Bank v. Washington*, 696 F.2d 692 (9th Cir. 1983).

hybrid standard of judicial review—explicitly drawn by the Second Circuit from the First Circuit's decision in *Local Division 589, Amalgamated Transit Union v. Massachusetts*, 666 F.2d 618 (1st Cir. 1981) (Breyer, J.)—that is both designed to, and in practice does, afford State Legislatures broad discretion to choose contract impairment as an alternative for achieving the State's public policy goals in the interest of avoiding "a dangerous return to the days of *Lochner v. New York*, 198 U.S. 45 (1905)." *See* Pet. App. 12a. The First Circuit, in its turn, had adopted a less exacting hybrid standard of judicial review in *Local Division 589* as the appropriate standard for determining the constitutionality of state legislative action impairing *non*-financial governmental contractual obligations. And, in so doing, the First Circuit was at pains to point out that its *Local Division 589* standard *is entirely distinct* from the "*United States Trust* . . . stricter [judicial] 'review' approach to state laws in the 'financial' area—laws which impair a state's 'financial obligations.'" *See* 666 F.2d at 642.

In short, it could not be more plain that the Second Circuit was from the outset proceeding on the basis of a different, less exacting standard of review in judging the constitutionality of the state legislative action impairing state political subdivision contractual financial obligations at issue here than the Ninth Circuit, following *United States Trust,* applied to such legislative action in *Continental Illinois National Bank.*[2]

Beyond that, the operative sections of the Second Circuit's opinion—sections II.B.3 & 4 of the opinion entitled "The Wage Freeze is Reasonable and Necessary" and "Present

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[2] The same is true with respect to the California Supreme Court's decision in *Sonoma County Organization of Public Employees v. County of Sonoma*, 591 P.2d 1 (Cal. 1979), which we relied on in the Petition, *see* Pet. at 10, 14-15 n.6, but which Respondents ignore in their Opposition Brief.

Case Distinguishable From *Surrogates* and *Condell*"—have little if anything to do with applying the *United States Trust* "careful scrutiny" standard of judicial review to the State of New York's legislative action impairing its political subdivision's contractual financial obligations, and everything to do with applying a less exacting "deference to [the] legislat[ure]" standard of judicial review derived from the *Blaisdell*[3] standard for determining the constitutionality of *private* contract impairment legislation. For present purposes it suffices to note the point—substantiated in the margin—that in making each of its critical Contract Clause determinations, and in summarizing its Contract Clause holding, the Second Circuit relied first and foremost on *Blaisdell*.[4]

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[3] *Home Building & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

[4] Thus, in holding that New York's contract impairment legislative action was both "reasonable" and "necessary," the Second Circuit stated:

> In sum, the prospective and temporary quality of the wage freeze convinces us of its reasonableness. *See Blaisdell*, 290 U.S. at 447 (finding temporary nature of an impairment to be probative of reasonableness) *accord Spannaus*, 438 U.S. at 242-43; *Subway-Surface*, 44 N.Y.2d at 112-14 (attaching significance to the prospective characteristic of a law impairing public contracts); *cf. Energy Reserves Group*, 459 U.S. at 418-19 (finding as probative the temporary aspect of an impairing regulation in a private contract case). [Pet. App. 14a-15a.]
>
> * * *
>
> Finally, on the undisputed facts of this case, we find no need to second-guess the wisdom of picking the wage freeze over other policy alternatives . . . . *See Blaisdell*, 290 U.S. at 447-48 ("Whether the legislation is wise or unwise as a matter of policy is a question with which we are not concerned."); *Local Div. 589*, 666 F.2d at 643 (noting that the court could have balanced alternatives to impairment, but concluding that "[a]nswering these sorts of questions . . . is a task far better suited to legislators than to judges"); *see also Sal Tinnerello & Sons*, 141 F.3d at 54 ("[I]t is not the province of this Court to substitute its judgement for that of . . . a legislative body.") [Pet. App. 15a]
>
> * * *

The beginning and end of the Opposition Brief's response to the foregoing point is this:

> Petitioners' claim that the Second Circuit applied the more deferential standard of review outlined in *Blaisdell* takes portions of the Second Circuit's decision out of context. The Second Circuit referenced (as a "*see*" rather than as direct authority) *Blaisdell* . . . for the proposition that, "on the undisputed facts of this case," it should not "second-guess the wisdom of picking the wage freeze over other policy alternatives . . . ." (Pet App. 15a). [That] [c]itation [to *Blaisdell*] does not demonstrate that the Second Circuit failed to apply *U.S. Trust*. The proposition outlined in [*Blaisdell*]—that the Court should not analyze the policy alternatives—is wholly consistent with the *U.S. Trust* standard, which states: "[a]s is customary in reviewing economic and social regulation, however, courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." (431 U.S. at 22-23). [Opp. Br. at 10-11 (footnote and citations omitted).]

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> Our holding can be summarized simply: An emergency exists in Buffalo that furnishes a proper occasion for the state and BFSA to impose a wage freeze to "protect the vital interests of the community," and the existence of the emergency "cannot be regarded as a subterfuge or as lacking in adequate basis." *Blaisdell*, 290 U.S. at 444. Nor can the wage freeze be regarded as unreasonable or unnecessary to achieve the important public purpose of stabilizing Buffalo's fiscal position. [Pet. App. 17a]

To be sure, the Second Circuit also stated—without citation to *any* legal authority—that New York's contract impairment legislative action passed Contract Clause muster because that action was taken only after *the City of Buffalo* had exhausted *its* viable financial alternatives to contract impairment. *See* Pet App. 13a-14a. But that focus on *the City's* financial alternatives was an independent legal error that cuts in favor of and not against this Court's review of the decision below. *See infra* pp. 5-6.

There are two difficulties with this response. First, as the quotations in n.4 *supra* show, we have not taken anything in the Second Circuit's decision "out of context."

Second, Respondents' quotation from *United States Trust* does nothing to buttress the decision below. That quotation is itself plucked "out of context" from the end of a two paragraph portion of the *United States Trust* Court's opinion devoted solely to discussing the body of law that applies where a State impairs *private* contracts. *See* 431 U.S. at 22-23. To make that limited focus even plainer, the topic sentence of the very next paragraph in the Court's opinion changes the subject to the distinct body of law that applies where "a State impairs the obligation of its own contract." *Id.* at 23. And, in the ensuing portion of its opinion, the Court expressly states that it "is *not* appropriate" to review legislation impairing "a State's own financial obligations" under the same deferential standard that applies in reviewing legislation impairing private contracts, *id.* at 25-26 (emphasis added), and that *the appropriate standard* is the more exacting "careful scrutiny" standard, *id.* at 29 n.27.

II.

Secondarily, Respondents offer the soothing assurance that "the outcome in this case does not depend on the standard of [judicial] review applied . . . ." *See* Opp. Br. at 6-7. That is an empty assurance. We showed in Part II of the Petition that when the State of New York contract impairment legislative action at issue here *is* subjected to the *United States Trust* "careful scrutiny" that the Second Circuit improperly eschewed, the inescapable conclusion is that the State's legislative action violated the Contract Clause. *See* Pet. at 19-23. Respondents do nothing to contravene that showing.

Most tellingly, Respondents do *not* dispute the point that the State of New York had viable financial alternatives apart from contract impairment for achieving the State's public

policy goal of assisting the City of Buffalo balance its budget, but nevertheless chose contract impairment as a means of reaching that goal at a lower out-of-pocket cost to the State. Under *United States Trust*—and its "careful scrutiny" standard of judicial review—a State's financially-self-interested legislative choice of contract impairment in preference to other financially available alternatives for achieving the State's public policy goal is a legislative choice that the Contract Clause categorically condemns. *See* Pet. at 20-21; *see also id.* at 22-23 (citing a series of post-*United States Trust* decisions so holding or stating).

To be sure, throughout this litigation, and again in their Opposition Brief, Respondents have sought to obscure this basic lesson of *United States Trust* by shifting the focus from *the State of New York's* financial situation to *the City of Buffalo's* financial situation, and by arguing that *the City itself* did not have viable financial alternatives to contract impairment as a means of balancing its budget. That tactic did meet with great success in the court below. *See* Pet. App. 13a-15a. But, as we showed in the Petition, that success was wholly undeserved. *See* Pet. at 21-22. Indeed, the Second Circuit's heavy reliance on this untenable ground for upholding the state legislative action impairing state political subdivision contractual financial obligations at issue here serves only to underscore the irreconcilable conflict between the decision below and the Ninth Circuit's *Continental Illinois National Bank* decision holding legislative action of the same character unconstitutional.[5]

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[5] In *Continental Illinois National Bank*, the state political subdivision (WPPSS) whose contractual financial obligations were impaired by the State of Washington legislative action at issue there was, at the time of the impairment, in a no less dire and intractable financial predicament than the City of Buffalo was at the time of the State of New York contract impairment legislative action at issue here: WPPSS had entered into binding contracts to build three nuclear power plants, and the cost

## CONCLUSION

For the foregoing reasons, and those stated in the Petition, the Petition should be granted.

Respectfully submitted,

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overruns on that construction project were such as to increase the estimated cost to WPPSS of completing the project by six fold—from $1.9 billion to $12 billion. *See* 696 F.2d at 696 & n.8. Nevertheless, the Ninth Circuit had no difficulty in concluding that Washington's effort to improve "the State's own finances" by relieving WPPSS of its obligation to fulfill contracts that "had become too expensive [for WPPSS to fulfill]" violated the Contract Clause. *See id.* at 702.